IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	19 CR ~~03101-01~~
Plaintiff,	)	3104 Scw
	)	
v.	)	
	)	
JUSSIE SMOLLETT,	)	
	)	Hon. Steven G. Watkins
Defendant.	)	Judge Presiding

Order

This matter comes before the Court on Media Intervenors' "Emergency Motion to Intervene For Purposes of Objecting to and Vacating the Sealing Order" filed April 1, 2019. Counsel for Intervenors[1], the State, and Defendant, Jussie Smollet, appeared the next day. The Court found the matter was not an emergency requiring disposition at that time and set a briefing schedule. Defendant filed a responsive brief and Intervenors a reply. The State filed a motion to modify the sealing order to allow the Cook County Inspector General access to sealed records pursuant to an ongoing investigation. The parties submitted oral argument on May 16, 2019. This order follows.

Procedural Background

On March 7, 2019, a grand jury indicted the Defendant on 16 counts of disorderly conduct based on the principal allegation that he filed a false police report, a Class 4 felony, on January 29, 2019. On March 26, 2019, the State moved for entry of *nolle prosequi*

[1] See Motion naming media organizations participating in the case.

on all charges in the indictment. "A *nolle prosequi* is the formal entry of a declaration that a case will not be further prosecuted." *People v. Baes*, 94 Ill. App. 3d 741, 746 (1981). The State's Attorney has broad discretion to file a *nolle prosequi* and "the trial court is required to enter the *nolle prosequi* absent a clear abuse of the prosecutor's discretion." *People v. Bradley*, 128 Ill. App. 3d 372, 382 (1984).

In the same hearing, the Defense requested immediate sealing of the records in this case. The State did not object. Defense counsel prepared an order for immediate sealing using a template form for that purpose available from the Clerk of the Circuit Court and presented it to the Court. With nothing offered in opposition, the Court signed the order and entered it on the record.

Immediate Sealing

The Illinois Criminal Identification Act (20 ILCS 2630/1 *et seq.*) provides for the immediate sealing of eligible records related to arrests "resulting in acquittal or dismissal with prejudice" except for minor traffic offenses. 20 ILCS 2630/5.2(g)(2). "Seal" means to physically and electronically maintain the records, but to make the records unavailable without a court order. *Id.* at § 5.2(a)(1)(k). Circuit courts are directed to inform eligible defendants of their right to the procedure for immediate sealing. *Id.* § 5.2(g)(4). A defendant can request immediate sealing the same day and in the same hearing in which their case is disposed. *Id.* § 5.2(g)(2). The trial judge is to rule on and enter an order granting or denying the request in the same hearing. *Id.* § 5.2(g)(5)(E). Records may be sealed immediately after entry of the final disposition in the case. *Id.* § 5.2(g)(3). An order so entered, though, is not final upon entry. *Id.* § 5.2(g)(5)(J). Rather, copies of the order

must first be served upon the Department of State Police, the State's Attorney, the arresting agency, and the chief legal officer of the unit of local government effecting the arrest. *Id.* § 5.2(d)(8). After 30 days from service upon those parties, the order is final and appealable. *Id.* § 5.2(g)(5)(J). However, the petitioner, the State's Attorney, or the Department of State Police may file a motion to vacate, modify, or reconsider the order regarding immediate sealing within 60 days. *Id.* § 5.2(g)(5)(K). A motion granting immediate sealing is not void if the petition failed to comply with the provisions of the statute or any reason set forth in a motion. *Id.* § 5.2(g)(5)(L). Instead, "[t]he circuit court retains jurisdiction to determine whether the order is voidable, and to vacate modify, or reconsider its terms." *Id.*

Public Access to Court Records

Intervenors contend that the sealing order in this case violates the public's right of access to court records and proceedings rooted in the first amendment to the United States' Constitution, the Illinois Constitution, and common law. In their briefs, Intervenors argued the immediate sealing provision of the Criminal Identification Act is facially unconstitutional. At oral argument though, Intervenors stated solely that the sealing order in this case is constitutionally invalid as applied. Courts are cautioned to refrain from ruling on the constitutionality of a statute if a matter can be decided on other grounds. *People v. Jackson*, 2013 IL 113986, ¶ 14. Accordingly, the Court will analyze Intervenors more limited as-applied challenge to the order and reach the constitutionality of the immediate sealing provision only as a last resort.

In their arguments, Intervenors rely on decisions of the United States and Illinois Supreme Courts recognizing the right of public access to court records. See, e.g., *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1, 9 (1986) (*Press-Enterprise II*); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 231 (2000). Under that precedent, a presumption of access attaches to court records that meet what are called the experience and logic tests. This analysis asks, first, whether the records at issue have historically been open to the public—the experience test—and, second, whether "public access plays a significant positive role in the functioning of the particular process in question"—the logic test. *Press Enterprise II*, 478 U.S. at 8. "If the presumption applies to a certain type of proceeding or record, the trial court cannot close this type of proceeding or record, unless the court makes specific findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve those values." *People v. Kelly*, 397 Ill. App. 3d. 232, 261 (2009) (citing *Press-Enterprise II*, 478 U.S. at 13-14 and *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*)).

However, the authority Intervenors cite on this subject generally concerns pending cases. See, e.g., *People v. Zimmerman*, 2018 IL 122261; *Kelly*, 397 Ill. App. 3d 232. The records in this case, by contrast, concern a matter that is, at this time, final. "The United States Supreme Court has yet to address whether the records of criminal cases that have been dismissed or subject to *nolle prosequi* are entitled to First Amendment presumption of access." *Commonwealth v. Pon*, 469 Mass. 296, 308 (2014) (still true at this time). Neither

has the Illinois Supreme Court. While neither court has spoken on this issue, courts of other jurisdictions have.

The decision of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Pon*, analyzing that state's sealing statute, is guiding. In *Pon*, the court noted that exceptions to public access for some court records have been long recognized. It then concluded, "the records of closed cases resulting in certain nonconvictions have not been open historically in the same sense as other, constitutionally cognizable elements of criminal proceedings." *Id.* at 310. Thus, the experience test did not call for a presumption of access. Likewise, the court observed only a narrow class of cases were at issue—those resulting in dismissal or *nolle prosequi*. So, the court concluded "[t]here is no indication that the availability of records of criminal cases that have been closed after nonconviction enhances the basic fairness of the criminal trial and the appearance of fairness as the openness of criminal trials does." *Id.* at 310-11. (citations omitted). Thus, the logic test did not work in favor of the first amendment presumption either.

Despite finding the first amendment presumption of access did not attach to the records of such cases, the court found that the records are subject to the common-law presumption of public access. *Id.* at 311. The consequence of that distinction is that access may be restricted on a showing of good cause rather than specific findings that restriction is essential to serve a compelling interest and the means are narrowly tailored to achieve that interest. *Id.* at 312. While the burden on a defendant is lower, this standard still ensures that "sealing may occur only where good cause justifies the overriding of the general principle of publicity." *Id.* at 313.

The Supreme Court of Ohio reasoned similarly when a newspaper challenged the constitutionality of that state's statute providing for the sealing of records in criminal cases resulting in acquittal. *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382 (2004). That court found the statute called for the judge to balance the public's right of access and the acquitted defendant's right to privacy before ordering records sealed. *Id.* at 384. Other courts have similarly concluded that sealing criminal records in a closed case involves balancing and the defendant bears the burden to show good cause. See, *Johnson v. State*, 50 P.3d 404 (Alaska Ct. App. 2002); *State v. D.H.W.*, 686 So. 2d 1331 (Fla. 1996); *In re Kollman*, 210 N.J. 557 (2012).

This Court is not persuaded that the first amendment presumption of access attaches to records in a criminal case that was disposed by entry of *nolle prosequi*. Intervenors have made no showing to establish such under the experience and logic tests. Further, the Supreme Judicial Court of Massachusetts' opinion is persuasive that the presumption does not attach. As a result, "specific findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve those values" were not required for Defendant's records to be sealed or to remain sealed.

Nonetheless, persuasive authority indicates that the common-law presumption does apply. Illinois recognizes the common-law presumption of public access to court records. *Skolnick*, 191 Ill. 2d at 230. Yet, the common-law right of access to judicial records is not absolute. *Zimmerman*, 2018 IL 122261, 43. "[W]hether court records in a particular case are opened to public scrutiny rests with the trial court's discretion, which must take into consideration all facts and circumstances unique to that case." *Skolnick*, 191 Ill. 2d at

231. This is fitting given that the statute contemplates that records "may be sealed" rather than "shall" be sealed. 20 ILCS 2630/5.2(c)(2), (g)(2). The similarly worded expungement provisions of the Criminal Identification Act, have also been construed as discretionary. *People v. Carroccia*, 352 Ill. App. 3d 1114, 1118 (2004). Accordingly, sound discretion suggests records may be sealed over the common-law presumption of access only for good cause.

As outlined above, granting a request for immediate sealing upon the disposition of a dismissed criminal case is not final at that point. The immediate sealing provisions expressly contemplate that the order can be challenged and reviewed. Thus, when reviewing an order granting immediate sealing, the issue is not whether the sealing order was proper in the first instance, but whether the records in the case should remain sealed.

Intervenors are not a party listed in the statute who may file a motion to vacate, modify, or reconsider a sealing order. However, neither the State nor Defendant have challenged the Intervenors' standing and the issue can be deemed waived. *Cf. Skolnick*, 191 Ill. 2d at 237. At the same time, the circuit court has the inherent power to modify or vacate an interlocutory order. *Hernandez v. Pritikin*, 2012 IL 113054, ¶ 42. Therefore, it is not inconsistent with the statute nor beyond the Court's authority to examine anew whether records in a criminal case should be sealed.

Good Cause

Intervenors contend that good cause does not exist for the records to remain sealed. They note that the matter has been widely publicized and the Defendant and his attorneys have appeared on national television discussing the case. In their view, the

purpose of sealing records of a dismissed criminal case is to remove or diminish the impediment to future employment resulting from knowledge of a defendant's arrest. They argue sealing does not serve that purpose here because Defendant's arrest is already well-known. Intervenors further claim that this case implicates issues regarding the functioning of a governmental office and the integrity of the judicial system.

Defendant argues that a defendant whose case is dismissed should not be deprived of the statutory right to have records sealed simply because the news media covered the case. To him, the Intervenors position is self-fulfilling. That is, the case has been the subject of substantial public attention because they made it so. In addition, he notes the news media was present at each court appearance and had opportunity to access the sealed records before March 26, 2019.

Defendant's argument has some appeal. Indeed, there is a certain irony that the Intervenors purport to seek access based on a perception that Defendant was treated differently from other criminal defendants, yet they would have him treated differently from other criminal defendants who, by statute, have the right to request the records of their case be sealed. Criminal defendants whose cases end in acquittal or dismissal have legitimate interests in having their records sealed in addition to the effect the case may have on future employment. These include reputational and privacy interests. Defendant's brief terms his privacy interest as "the right to be let alone."

To be sure, it is easily conceivable that a defendant whose case was dismissed would wish to maintain his sense of privacy, even if, perhaps especially if, the media covered the case. And it would seem inequitable to deny such a defendant simply seeking

to maintain his privacy of his right to have records sealed because the media covered his case—even if that defendant is a public figure. See, *Pon*, 469 Mass. at 318 ("where the crime or the case was newsworthy, the judge should consider whether the defendant maintains any sense of privacy, such that sealing could still have a positive impact").

However, that isn't this case. The Defendant voluntarily appeared on national television for an interview speaking about the incident in detail.[2] After the March 26 dismissal, he voluntarily stood in front of cameras from numerous news organizations in the courthouse lobby and spoke about the case. On several occasions, attorneys for Defendant, presumably with his authorization, appeared on various media outlets speaking about the case. These are not the actions of a person seeking to maintain his privacy or simply be let alone. While the Court appreciates that the Defendant was in the public eye before the events that precipitated this case, it was not necessary for him to address this so publicly and to such an extent. By doing so, the Court cannot credit his privacy interest as good cause to keep the case records sealed. Defendant also posits that some sealed records may contain medical, financial, or other personal information. His privacy concerning those matters, though, is protected by the provisions of the Freedom of Information Act that call for withholding or redacting certain information. When balanced against the value of openness, the Defendant has not shown good cause to rebut the common-law presumption of public access.

[2] The Court takes judicial notice of the media coverage of this case. These facts are beyond reasonable dispute and both counsel for Intervenors and Defendant remarked "everyone from here to Helsinki knows about this" at oral argument.

Conclusion

Based on the foregoing discussion, the Court finds as follows:

(1) the common-law presumption of public access applies to the records at issue in this case;

(2) an order granting immediate sealing pursuant to the Criminal Identification Act is interlocutory and may be vacated or modified;

(3) whether records should remain sealed is discretionary;

(4) good cause does not exist to keep the records of this case sealed;

(5) having decided the matter on other grounds, the Court need not address the constitutional issues raised by Intervenors.

Accordingly, Intervenors motion to Intervene is **Granted** and the Court hereby vacates the sealing order of March 26, 2019.

Entered:

Judge Steven G. Watkins
Cook County Circuit Court
Criminal Division

Date: May 23, 2019

ENTERED
JUDGE STEVE G. WATKINS-2117
MAY 23 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK